IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 2ND FEBRUARY 2007 / 13TH MAGHA 1928

CRL.A.No. 2038 of 2006(C)

SC.51/2003 of ADDL. SESSIONS COURT (ADHOC-III), KASARAGODE
CP.80/2001 of JUDL. MAGISTRATE OF FIRST CLASS, KASARAGOD

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APPELLANT:

M.BHASKARA, S/O. SUNDARA,
C.NO.3647, CENTRAL PRISON, KANNUR.

BY ADV. ADV.K.P.HARISH(STATE BRIEF)

RESPONDENT:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.S.DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 2038 of 2006

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Dated this the 2nd day of February, 2007.

JUDMENT

The appellant was the accused in S.C.No.51/2003 on the file of the Court of the Additional Sessions Judge (Adhoc) III, Kasaragod. He faced trial for for the offence punishable under section 55(a) of the Abkari Act on the allegation that he was found in possession of MO1 bag containing 180 ml. of 21 bottles of foreign liquor with a label of "Original Choice Deluxe Whisky for sale in Karnataka only" in contravention of the provisions of the Abkari Act. To prove the charge against the appellant, the prosecution examined PW1 to PW5 and produced Exts.P1 to P8. MO1 and MO2 series were also produced on the side of the prosecution. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the allegation and stated that he was innocent. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(a) of the the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for four years and to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for six months. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. Since the appeal has been filed through the jail authorities and no counsel has been engaged to defend the case of the appellant, this Court appointed a member of State Brief panel to defend the case of the appellant.

3. Learned counsel for the appellant mainly raised three contentions before to challenge the impugned judgment. Firstly, it is contended that the trial court went wrong in placing reliance on the official witnesses to find the appellant guilty of the charge and that there is no independent evidence to support the prosecution case and hence the finding entered by the trial court on the basis of the official witnesses is wrong. Secondly, it is contended that the police officials, who registered the crime, prepared the documents with regard to the seizure of the contraband article and taking of the sample, have not complied with the procedure prescribed under the provisions of the Abkari Act as well as the Kerala Excise Manual. Thirdly, it is contended that the trial court has committed serious error in convicting the appellant under section 55(a) of the Abkari Act, as the prosecution had failed to prove that the possession was during the course of import, export, transport or transit of the contraband article.

4. To prove the case against the appellant, the prosecution mainly relied on the evidence of PW4 who detected the offence. He had given evidence that on 21-3-2001 at about 7.30 p.m. he got information that the appellant was selling arrack from the lane in between the shop of Ahammad and Nagesh situated near the railway road junction. Accordingly, himself and police party went to the spot and when they reached the above said lane, they found the appellant standing with a plastic bag. He also stated that though the appellant had tried to run away, he was prevented. On examination, it was found that the bag containing 180 ml. of 21 bottles of foreign liquor. As per Ext.P1 arrest memo, the appellant was arrested and after preparing Ext.P3 seizure mahazar the contraband article was seized. This witness further stated that from the bottles, two bottles were taken as sample and the same was sealed and labelled in the presence of independent witnesses, PW2 and PW3. He further stated that he produced the appellant, records and thondi before the police station and registered Ext.P4 First Information Report against the appellant. PW1, the then Police Constable who accompanied the party has given evidence in corroboration of the evidence already tendered by PW4. PW2 and PW3, the independent witnesses have not supported the prosecution and hence they were declared as hostile to the prosecution.

PW5 who continued the investigation of the case submitted Ext.P5 property list and Ext.P7 chemical analysis report. As per Ext.P7 report, it is revealed that the sample contained 42.22 per cent by volume of ethyl alcohol. After considering the entire evidence this Court finds that prosecution has proved that the appellant was found in possession of MO1 bag containing MO2 series foreign liquor bottles.

5. Question to be considered in this appeal is whether the conviction entered by the trial court under section 55(a) of the Abkari Act is sustainable or not ?

6. The prosecution case is that the appellant was found in possession of MO1 bag which contains 21 bottles of foreign liquor. The prosecution has no case that the possession of the contraband article was in connection with export, import, transport or transit of liquor as contemplated under section 55(a) of the Abkari Act. Hence, as per the principles laid down in Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631), this Court is of the view that the mere possession of the contraband liquor is not an offence punishable under section 55(a0 of the Abkari Act. Therefore, the finding of the trial court that the appellant was

found guilty under section 55(a) of the Abkari Act is not legally sustainable. However, the prosecution has succeeded in proving that the petitioner was found in possession of MO1 and MO2 and as per Ext.P7 chemical analysis report, it is proved that the sample contained 42.22 per cent by volume of ethyl alcohol and that the appellant was not having any licence as per the provisions of the Abkari Act. In the circumstances, this Court is of the view that the offence committed by the appellant would come under section 58 of the Abkari Act

7. Therefore, the conviction and sentence awarded against the appellant under section 55(a) of the Abkari Act is set aside. The appellant is found guilty under section 58 of the Abkari Act. Accordingly, the appellant is convicted under section 58 of the Abkari Act and sentenced to under go rigorous imprisonment for one year and to pay fine of Rs.1,00,000/- and in default to undergo simple imprisonment for six months.

The appeal stands partly allowed as above.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. No. 2038 of 2006

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Judgment

2-2-2007